No. 85-701

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FEDERAL ELECTION COMMISSION,
Appellant,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC.,
Appellee.

On Appeal from the United States Court of Appeals for the First Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE APPELLEE

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("Chamber") hereby moves pursuant to Supreme Court Rule 36.2 for leave to file the attached brief *amicus curiae* in support of the appellee.[1] The Chamber is the nation's largest federation of businesses, trade and professional associations, and state and local chambers of commerce. The Chamber's membership con-

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[1] This motion is necessitated by the refusal of the appellant, Federal Election Commission, to consent to the filing of this brief. The appellee, Massachusetts Citizens for Life, Inc., has consented to the filing of the brief.

sists of more than 180,000 corporations, partnerships, and proprietorships, as well as several thousand trade and professional associations, and state and local chambers of commerce. The Chamber's *raison d'etre* is the representation of its members' interests before the legislative, executive, and judicial branches of the government. With regard to the latter, the Chamber has represented its members' interests in numerous cases before this and other courts, including cases involving First Amendment rights.[2]

In furtherance of its members' interests, the Chamber is also heavily involved in other aspects of the federal political process. As more fully explained in its brief, the Chamber has for many years published voting records similar in many respects to those at issue in the instant case. Partially as a result of advice received from the Federal Election Commission ("FEC") that using Chamber funds to distribute these voting records to individuals who were not members of the Chamber would violate 2 U.S.C. § 441b, the Chamber formed its own separate segregated fund, the National Chamber Alliance for Politics ("NCAP").[3]

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[2] *See, e.g., Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530 (1980); *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978); *FEC* v. *Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45 (2d Cir. 1980); *Martin Tractor Co.* v. *FEC*, 460 F. Supp. 1017 (D.D.C. 1978), *aff'd*, 627 F.2d 375 (D.C. Cir.), *cert. denied sub nom. National Chamber Alliance for Politics* v. *FEC*, 449 U.S. 954 (1980).

[3] The manner in which the separate segregated fund of a trade association, such as NCAP, may solicit funds is severely restricted by the Federal Election Campaign Act and its implementing regulations. These restrictions were challenged by the Chamber's litigation affiliate in *Bread Political Action Comm.* v. *FEC*, 635 F.2d 621 (7th Cir. 1980), *rev'd and remanded on procedural grounds*, 455 U.S. 577 (1982), *remanded to district court*, 678 F.2d 46 (7th Cir. 1982), *complaint withdrawn*, No. 77-C-947 (N.D. Ill. Feb. 1, 1983).

The Chamber, itself, therefore, has been restricted by the same statutory provisions at issue here, in a manner similar to that of the Massachusetts Citizens for Life. The Chamber believes it is important for this Court, in determining whether the restrictions imposed by the FEC on distribution of voting records are constitutionally permissible, to understand the numerous factual contexts in which these restrictions are being imposed. Accordingly, the brief appended hereto explains the Chamber's own personal experience with the restrictions imposed by the FEC on the distribution of voting records. For these reasons, the Chamber respectfully requests that its motion for leave to file a brief *amicus curiae* be granted.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE APPELLEE

STATEMENT OF INTEREST

The Chamber of Commerce of the United States ("Chamber") is the nation's largest federation of businesses, with a membership of more than 180,000 corporations, partnerships, and proprietorships, as well as several thousand trade associations and state and local chambers of commerce. As a non-profit, tax-exempt corporation, the Chamber depends primarily on its members' voluntary dues for operating revenue.

The Chamber's primary purpose is the representation of its members' interests at all levels of the federal political process. In this regard, the Chamber takes positions on numerous legislative issues pending before the Congress. The Chamber urges Congress to adopt its position by presenting direct testimony before congressional committees, employing registered lobbyists, and urging its members to persuade their Senators and Representatives to adopt the Chamber's views. The Chamber acts in a similar manner in urging the Executive Branch to adopt policy and regulatory positions favorable to its membership.[1] In carrying out its functions, the Chamber utilizes the full gamut of communication tools, including television and radio.

In view of the Chamber's federal policy-making activities, it is not surprising that many years ago it began compiling and publishing voting records of incumbent members of Congress.[2] These voting records contain a score based on each member's overall votes on issues important to the Chamber. They were initially distributed to both Chamber members and the public. The similarity of the Chamber's activities to those of the appellant, Massachusetts Citizens for Life, Inc. ("MCFL") is, therefore, obvious.

In 1976 and 1977, however, the Federal Election Commission ("FEC") issued two advisory opinions which caused the Chamber to terminate all free distribution of its voting records to non-members of the Chamber. These opinions stated that the Chamber's voting records were partisan political communications and therefore distribu-

[1] As evidenced by the filing of this brief, the Chamber also actively represents its members' interests before the courts through the activities of an affiliated organization, the National Chamber Litigation Center, Inc.

[2] The Chamber's publication and distribution of voting records and the Federal Election Commission's restriction of the distribution of those records is discussed in much greater detail, *infra*.

tion to the general public violated 2 U.S.C. § 441b. They are premised on the same legal theory underlying the FEC's position in the instant case.

It is clear that the FEC's restrictions strike at the very heart of the Chamber's activities: its ability to communicate openly and freely on the policy positions taken by members of Congress. The Chamber believes that the restrictions imposed by the FEC seriously impede its First Amendment rights. It is for this reason that the Chamber submits this brief *amicus curiae*.[3]

STATEMENT OF THE CASE

This federal campaign expenditure case arises out of an enforcement action filed by the FEC against the Massachusetts Citizens for Life, a non-profit, issue-oriented corporation, for distributing two "Special Election Editions" of its newsletter to the general public in violation of § 441b of the Federal Election Campaign Act of 1971 ("FECA"), as amended. 2 U.S.C. § 441b. Section 441b prohibits corporations from using general treasury funds to make a contribution or expenditure in connection with a federal election.

The FEC charged that MCFL's publications were illegal campaign expenditures under § 441b and that distribution outside its membership should have been financed through a separate segregated fund pursuant to § 441b (b) (2) (B) of the Act. The U.S. District Court for the District of Massachusetts disagreed that the expenditures were prohibited,[4] and, in the alternative, held that

[3] The FEC's interpretation of § 441b also severely impacts many of the Chamber's association and state and local chamber of commerce members who are involved in activities similar to that of the U.S. Chamber and the MCFL.

[4] The District Court held that the publications did not constitute § 441b expenditures because they were (1) "uninvited by any candidate and uncoordinated with any campaign" (*i.e.*, independent

any prohibition on publication and distribution would violate MCFL's First Amendment rights. The U.S. Court of Appeals for the First Circuit affirmed on constitutional grounds. 769 F.2d 13 (1st Cir. 1985). It found that § 441b was a "content-based restriction of expression," which was not justified by the governmental interests cited by the FEC, and held that "the application of § 441b to indirect, uncoordinated expenditures by a non-profit ideological corporation expressing its views of political candidates violates the organization's First Amendment rights." 769 F.2d at 23. The FEC appealed, and this Court noted probable jurisdiction.

ARGUMENT

I. THE CHAMBER'S EXPERIENCE WITH FEC RESTRICTIONS ON THE DISTRIBUTION OF VOTING RECORDS

A. How They Voted

Since 1966, the Chamber has published *How They Voted*, which is its own rating of incumbent Members of Congress. The Vice President for Legislative Affairs and his staff are responsible for the selection of issues upon which the evaluations are made.

How They Voted offers a representative sampling of floor votes taken on issues important to the business community. The votes of each Senator and Representative on these issues are listed, either as a "Right" vote, supporting the Chamber's position, or a "Wrong" vote, contrary to the Chamber's position. The percentage of right votes out of the total number of votes cast by that Member on Chamber selected issues during that session is presented. Also shown is the cumulative percentage of

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expenditures) and (2) covered by the newspaper exemption from the definition of expenditure in § 431(9)(B)(i) of FECA. *FEC* v. *MCFL*, 589 F. Supp. 646 (D. Mass. 1984).

right votes out of the total number of votes cast by that member on Chamber selected issues.

How They Voted is published on a regular basis, whether or not it is an election year. All Members of Congress are listed, whether or not they are candidates for Federal office, and no mention is made as to the candidacy of any particular member. The ratings are not prepared in cooperation or conjunction with any candidate for Federal office; they are independently assembled by the U.S. Chamber.

How They Voted was offered as a special supplement in *Congressional Action*, a publication produced by the Chamber's legislative department and devoted exclusively to an analysis and review of pending legislation of interest to Chamber members, and both individual copies and bulk quantities of reprints of this special supplement were sold to Chamber members and the general public. Copies were also provided to members of the general public at no charge. At present, however, as a result of the FEC's interpretation of § 441b, members of the general public who wish to receive *How They Voted* are charged for their copies. *How They Voted* is currently published in *The Business Advocate*, a Chamber membership publication, after the conclusion of each session of Congress.

B. They Grade the Congress

Complementing *How They Voted*, the Chamber began publishing *They Grade the Congress* in 1969, which, in its original form, was a compilation of the "ratings" given to incumbent Members of Congress by various organizations, including the Committee on Political Education (COPE) (the political action arm of the AFL-CIO), Americans for Constitutional Action, and Americans for Democratic Action. More recently, the Chamber's own ratings as published in *How They Voted* have also been included in *They Grade the Congress*.

They Grade the Congress has been made available in four ways over the years. First, it was published on a one-time basis as a special supplement to the Chamber's weekly *Congressional Action*. Second, it was published on an annual basis in *The Business Advocate*, a monthly publication which also analyzes and reviews pending legislation, as well as other issues of interest to Chamber members. Third, *They Grade the Congress* was offered for sale to both members of the Chamber and the general public. Both individual copies and bulk quantities for further distribution were sold. Fourth, and finally, on a selected basis, single copies were provided at no charge to members of the general public. This method of distribution was terminated in 1976.

C. The Litchfield Letter

The Chamber's ratings were from time to time reprinted in whole or in part by other organizations, including corporations and trade associations, and by the general news media, especially in publications which report on legislative and political developments in Washington, D.C. As a result, *How They Voted* was widely disseminated both directly by the Chamber and through other institutions.

In its September 1976 issue, *Reader's Digest* magazine noted in a brief article that *How They Voted* was available from the Chamber upon request at no charge. In response to this article, the Chamber received more than 1,000 requests for this publication from individuals, the majority of whom were not Chamber members. The Chamber believed that the Supreme Court's dispositive treatment of § 608(e) of the 1974 amendments to the Federal Election Campaign Act in *Buckley* v. *Valeo*, 424 U.S. 1, 45-47 (1976), as well as the decisions of other federal courts in *Schwartz* v. *Romnes*, 357 F. Supp. 30 (S.D.N.Y. 1973); *United States* v. *National Committee for Impeachment*, 469 F.2d 1135 (2d Cir. 1972), and *ACLU* v. *Jennings*, 366 F. Supp. 104 (D.D.C. 1976), resolved any question of the permissibility of such distribution in favor of dissemination. Nonetheless, acting from an abundance of caution, by letter dated September 28, 1976, the Chamber requested confirmation from the FEC that this free distribution of *How They Voted* would not violate 2 U.S.C. § 441b, the general prohibition upon political activity by corporations and labor organizations.

On October 12, 1976, N. Bradley Litchfield, Assistant General Counsel of the FEC, responded that the distribution of *How They Voted* to individuals who are not members of the Chamber "would be prohibited by 2 U.S.C § 441b, unless financed from voluntary contributions to a separate segregated fund, which may be used by a corporation for political purposes." FEC Opinion Letter O/R #790, *reprinted in full* at Appendix 1a. Mr. Litchfield further stated that "interpreted voting records of a Federal officeholder, reasonably read to support or oppose the voter, were in connection with a Federal election and thus precluded by 2 U.S.C. § 441b," and that:

> [A] corporation like the Chamber may make partisan communications (other than solicitations) to the general public so long as the communications are not financed from general corporate funds . . . Furthermore, if the communication is limited to members of the Chamber, the communication may be both partisan and financed from the Chamber's treasury.

As a result of Mr. Litchfield's determination, the Chamber contacted each of the more than 1,000 non-members who had requested copies of *How They Voted* and informed them that due to FEC requirements, the Chamber was unable to provide them with free copies of the publication.

Upon receipt of the Litchfield letter, the Chamber was confronted with the following situation: publications which (1) contained publicly available information, (2) were published regularly, without mention of any Federal election or the candidacy of any particular Member

of Congress, (3) were prepared independently and were uncoordinated with any candidate, and (4) had previously received wide circulation by the Chamber and others, including the news media, could no longer be distributed at the Chamber's expense to anyone other than the Chamber's members. Consequently, commencing in October 1976, no free copies of *How They Voted* or *They Grade the Congress* were distributed to anyone who was not a Chamber member, thereby foreclosing distribution at no charge even to those incumbent Members of Congress who were the subjects of the rating.

In response to an obvious desire of at least some segment of the general public to have access to its voting records, yet fearing the civil and criminal penalties attendant upon violation of the Act, the Chamber, in the fall of 1976, began to study alternative means by which this public information might be legally distributed to any requestor.[5] In December 1977, some fourteen months after the Litchfield letter, the Chamber established a separate segregated fund (the National Chamber Alliance for Politics, or "NCAP") as a vehicle for distributing both ratings of Members of Congress—which the Chamber obviously still believes had been incorrectly categorized by the FEC as partisan political communications—and as a vehicle for engaging in activities with the general public

[5] After the Litchfield letter, distribution to non-members by the Chamber at no charge would presumably have been viewed at least by the FEC as a "knowing and willful" violation of the Act, potentially triggering the more severe civil penalties found in 2 U.S.C. §§ 437g(a)(6) and (7), as well as the criminal penalties contained in 2 U.S.C. § 441j. While the FEC's regulations were subsequently amended to permit corporations "to distribute to the general public the voting records of Members of Congress as long as the preparation and distribution is not for the purpose of influencing a Federal election," 11 C.F.R. § 114.4(b)(4), it is still unclear to the Chamber whether a distribution of *How They Voted* or *They Grade The Congress* to the general public would be permitted by the FEC, particularly during an election year.

which expressly advocate the election or defeat of candidates for federal office.

It was not until eighteen months after Mr. Litchfield's letter that the FEC retrenched ever so slightly from its apparent position that the Chamber could not distribute such ratings even to Members of Congress. In Advisory Opinion 1978-18, issued in response to a request from Congressman Dickinson, then ranking minority member of the House Administration Committee (which has jurisdiction over the FEC), the FEC held that the Chamber could make such a limited distribution. In so doing, the Commission dramatically revealed the fundamental vice underlying its analysis of the applicable provisions of the Federal Election Campaign Act. For, the FEC permitted this distribution specifically because:

> that distribution would be made to all members of Congress whose voting records are presented . . . without regard to the status of the recipient as a candidate . . . Moreover, there is *no evident purpose to influence federal elections via the proposed distribution.*

FEC Advisory Opinion 1978-18, Federal Election Campaign Financing Guide (CCH) ¶ 5305 at 10,267 (emphasis added).

II. THE CHAMBER'S ATTEMPT TO COMPLY WITH FEC RESTRICTIONS HAS FORCED IT TO SET PRIORITIES AND LIMIT COMMUNICATION EFFORTS

As a result of the Litchfield letter, the Chamber must use the resources of NCAP, its separate segregated fund, to subsidize the distribution of its voting records. Through NCAP, the Chamber must overcome numerous constraints, some of which are insurmountable, before it can distribute its voting records to the general public.

For example, the Chamber is severely limited in the ways in which it can solicit contributions to NCAP. Specifically, 2 U.S.C. § 441(b)(4)(D) provides that or-

ganizations like the Chamber must obtain written permission from each corporate member before any solicitation may be made to the shareholders or to the executive or administrative personnel of that member corporation. Further, this prior permission may be granted by a corporation to only one such association per calendar year; and, finally, there is an absolute prohibition upon any solicitation of non-members regardless of the affinity of interest these persons may have with the Chamber.[6]

Thus, for example, for calendar year 1986, only 29 corporate members have given prior permission although the Chamber has more than 180,000 incorporated members. Similarly, neither the Chamber nor NCAP may solicit contributions from other separate segregated funds, 2 U.S.C. § 441(b)(4)(A), although it is legal for NCAP to accept unsolicited "transfers" from other separate segregated funds.[7] Clearly, the solicitation provisions severely limit the amount of funds NCAP can raise.

Second, the legal position adopted by the FEC has forced the Chamber to divert scarce NCAP resources away from partisan political activity to the extent that the Chamber desires to widely disseminate these voting records. As a result, there is a second generation impact upon the Chamber's ability to engage in political speech unconnected with the distribution of the ratings at issue here. As recognized by this Court in *Buckley*, "restrictions on

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[6] These provisions were challenged as violations of the First and Fifth Amendments in *Bread Political Action Comm.* v. *FEC*, 635 F.2d 621 (7th Cir. 1980), *rev'd and remanded on procedural grounds*, 455 U.S. 577 (1982), *remanded to district court*, 678 F.2d 46 (7th Cir. 1982), *complaint withdrawn*, No. 77-C-947 (N.D. Ill. Feb. 1, 1983).

[7] This anomalous situation was also attacked as a violation of the First and Fifth Amendments. *Martin Tractor Co.* v. *FEC*,, 460 F. Supp. 1017 (D.D.C. 1978), *aff'd*, 627 F.2d 375 (D.C. Cir.), *cert. denied sub nom. National Chamber Alliance for Politics* v. *FEC*, 449 U.S. 954 (1980).

the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." 424 U.S. at 19.

Third, the FEC's restrictions have limited the Chamber in its own membership solicitation activities, since it is unable to show prospective members copies of *How They Voted* as an example of the Chamber's effectiveness as a lobbying organization. In essence, the Chamber is prohibited from using *How They Voted* as a promotional vehicle, a use which is completely unconnected with political activity.

The FEC argues in its brief that the statutory provision for the creation of a voluntary separate segregated fund for political purposes represents a "permissible constitutional balance," and that such segregated funds are "nothing more than the 'political arms of the parent organizations.'" Brief for Appellant at 23, *quoting Bread Political Action Committee*, 635 F.2d at 624 n.3. The FEC would have this Court believe that the parties here can "adequately publicize [their] political views through a separate segregated fund . . . [and that] section 441b has neither the purpose nor the effect of limiting the free flow of political information and opinion from corporations and unions to the public." Brief for Appellant at 24. Indeed, the FEC asserts that "there is no evidence that any corporation or union has been unable to adequately publicize its political views through a separate segregated fund." *Id.*

To support its argument that section 441b does not unduly restrict the amount or manner of political speech, the FEC characterizes the establishment and operation of such funds as an "inconvenience" (*id.* at 25) which "some corporations might not find . . . palatable." *Id.* at 27, n.14. According to the FEC, "so long as it is financed

out of a separate segregated fund, a corporation or union can utilize any method of communication it desires." *Id.* at 25, n.13. This facile characterization of the impact of separate segregated funds on constitutionally protected speech is symptomatic of what has been called the FEC's "disturbing legacy," illustrating its "insensitivity to First Amendment values" and "abysmal" failure to "exercis[e] its power in a manner harmonious with a system of free expression." *FEC* v. *Central Long Island Tax Reform Immediately Committee* ("CLITRIM"), 616 F.2d 45, 53, 55 (2d Cir. 1980) (Kaufman, Oakes, JJ., concurring).

A separate segregated fund does not provide an adequate or equivalent substitute for engaging in political speech. And it is more than an "unpalatable inconvenience." Rather, a separate segregated fund imposes severe limitations on the amount and manner of political speech. As demonstrated above, the Chamber has had to forego broad distribution of its voting records to the general public because of the limitations placed upon NCAP's fundraising abilities. These restrictions have forced it to set priorities among its communications efforts with the general public, subsidizing some activities at the expense of others because of the limited amount of funds available. As noted above, they have even affected the Chamber's ability to attract new members by effectively precluding its sales force from demonstrating the Chamber's strength as a lobbying organization through *How They Voted*.

The Chamber urges this Court to adopt the First Circuit's reasoning that "the availability of alternative methods of funding speech [does not justify] eliminating the simplest method." 769 F.2d at 22. This is particularly important where, as here, the only available alternative is to create a separate segregated fund which is statutorily prohibited from raising adequate funds to subsidize the very speech at issue, namely, the distribution of voting records to the general public.

III. FEC RESTRICTIONS ON THE DISTRIBUTION OF VOTING RECORDS TO THE GENERAL PUBLIC IMPOSE AN UNREASONABLE BURDEN ON CONSTITUTIONALLY PROTECTED SPEECH AND ARE NOT JUSTIFIED BY A COMPELLING GOVERNMENT INTEREST

Voting records are commonly used to inform the public about the conduct of their government officials. Designed to specify the particular position taken by an official on various pieces of legislation of interest to the publishing organization and its members, they have been long recognized as vehicles for organizations to "discuss publicly and truthfully all matters of public concern . . . [and] embrace all issues about which information is needed." *Thornhill* v. *Alabama*, 310 U.S. 88, 101-102 (1940); *see also*, *Garrison* v. *Louisiana*, 379 U.S. 64, 75 (1964) ("speech covering public affairs is more than self-expression; it is the essence of self-government").

This Court has recognized that such publications deserve as much protection as possible, in light of the history of the First Amendment:

> [I]t is abundantly clear that . . . publications concerning candidates must be accorded at least as much protection under the First and Fourteenth Amendments as those concerning occupants of public office. . . . [I]t can hardly be doubted that th[is] constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.

Monitor Patriot Co. v. *Roy*, 401 U.S. 265, 271 (1971); *see also*, *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978); *Roth* v. *United States*, 354 U.S. 476 (1957). Accordingly, there is no question that voting records constitute "speech" within the meaning of the First Amendment. As stated by this Court in *Buckley*, 424 U.S. at 14:

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assume [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people,' . . . . [T]here is practically universal agreement that a major purpose of th[e] Amendment was to protect free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates . . . .' This no more than reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open' (citations omitted.).

The Second Circuit has agreed, albeit on narrower grounds than argued here, that the FEC may not restrict distribution of voting records like the Chamber's. In CLITRIM, 616 F.2d 45, the court held that political expression, including discussion of candidates, is entitled to broad constitutional protection.[8] The Second Circuit specifically stated that:

> Public discussion of public issues which are also campaign issues readily and often unavoidably draws in

[8] CLITRIM was an issue-oriented organization, like the Chamber and MCFL, which advocated lower taxes and less government spending. It was not affiliated with any political party, committee or candidate. The FEC alleged that CLITRIM had circulated a voting record which expressly advocated the election or defeat of a clearly identified candidate in violation of the filing and disclaimer requirements of 2 U.S.C. §§ 434(e) and 441(d). The voting record at issue set forth CLITRIM's position on certain tax matters, the voting record of a particular Member of Congress on legislation involving these matters (characterized as "For Lower Taxes and Less Government" or "For Higher Taxes and More Government"), a photograph of the Congressman, and commentary reflecting CLITRIM's view on the merits of the bills identified. Like the Chamber. CLITRIM's voting record did not refer to any federal election, nor did it mention the particular Congressman's political affiliation, his candidacy or any electoral opponents.

> candidates and their positions, their voting records and other official conduct. *Discussions of those issues, and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections.*

CLITRIM, 616 F.2d at 53, quoting *Buckley*, 424 U.S. at 42 n.50 (emphasis added). Indeed, the concurring opinion in *CLITRIM* emphatically decries the constraints the FEC has placed on organizations such as the Chamber and MCFL. Citing the FEC's action as both "perverse" and "disturbing," the concurring judges found that:

> [C]itizens of this nation should not be required to account to [a] court for engaging in political debate . . . [F]reedom to criticize public officials and oppose or support their continuation in office constitutes the 'central meaning' of the First Amendment . . . *Thus, courts have consistently struck down not only government attempts to restrain or punish expression, but also government regulation of speech designed to make information available to the public.*

Id. at 54 (emphasis added).

This Court has consistently held that the burden is on the government to show that the suppression of constitutionally protected speech is essential to a compelling government interest. *See, e.g., Elrod* v. *Burns*, 427 U.S. 347, 362 (1976); *United Steelworkers of America* v. *Sadlowski*, 457 U.S. 102, 111 (1982); *Brown* v. *Hartlage*, 456 U.S. 45, 54 (1982); *Cohen* v. *California*, 403 U.S. 15, 26 (1971). And the government's showing is subject to the strictest form of scrutiny by the courts. *See, FEC* v. *National Conservative Political Action Committee*, 84 L. Ed. 2d 445, 472 (1985) ("NCPAC"), *citing Buckley*, 424 U.S. at 29 ("when the First Amendment is involved, our standard of review is 'rigorous'"); *Citizens Against Rent Control* v. *Berkeley*, 454 U.S. 290, 298 (1981) ("regulation of First Amendment rights is always subject to exacting judicial scrutiny"); *NAACP* v. *Ala-*

bama, 357 U.S. 449, 460-461 (1958) ("it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny").

Just last term, this Court reiterated *Buckley's* view that the prevention of corruption or the appearance of corruption is the "only legitimate and compelling" government interest that can support a restriction on campaign finances. *NCPAC*, 84 L.Ed. 2d at 469. *Accord*, *Citizens Against Rent Control*, 454 U.S. at 297. In striking down the FECA's limitations on independent expenditures by political committees, this Court reaffirmed *Buckley's* holding that there is a "fundamental constitutional difference" between direct contributions to candidates and independent expenditures. "[T]he absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candate." 84 L. Ed. 2d at 470.

Thus, the Court held that the FEC's efforts in NCPAC "to link either corruption or the appearance of corruption to independent expenditures . . . simply does not pass [the Court's rigorous] standard of review." *Id.* at 472. Similarly, the FEC's efforts in this case to characterize voting records, particularly those compiled independent of any candidate, as a vehicle for political corruption also fail to establish either a legitimate or compelling government interest.

CONCLUSION

For these reasons, the Chamber of Commerce of the United States respectfully urges this Court to affirm the decision below.

Respectfully submitted,

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April 4, 1986

APPENDIX

APPENDIX

[EMBLEM]

FEDERAL ELECTION COMMISSION
1325 K Street N.W.
Washington, D.C. 20463

12 Oct. 1976

O/R # 790

Mr. Stanley T. Kaleczyc, Jr.
U.S. Chamber of Commerce
1615 H Street, N.W.
Washington, D.C. 20002

Dear Mr. Kaleczyc:

This is in response to your letter of September 28, 1976, requesting clarification of permissible nonpartisan activity under the Federal Election Campaign Act of 1971, as amended ("the Act"), which the Chamber of Commerce of the United States ("the Chamber") may engage in with respect to persons other than its membership.

I understand the Chamber, an incorporated federation of trade associations, prepared a rating of the Members of the 94th Congress, First Session, entitled "How They Voted." The rating, based on selected votes of U.S. Senators and Representatives, was originally published in the newsletter of the Chamber's legislative department, and subsequently reprinted in the May 31 edition of "Washington Report," the Chamber's general newsletter. You state "Reader's Digest" magazine sought and obtained approval from the Chamber's news department to publish a brief article indicating the existence and availability of the rating; the article appeared in the September issue of "Reader's Digest." As a consequence, the Chamber has received approximately 1,000 requests from

individuals for its rating, and asks whether its proposed distribution, to persons who are nonmembers of the Chamber, would be prohibited by the Act.

For the reasons discussed below, distribution by the Chamber of "How They Voted" to nonmembers would be prohibited by 2 U.S.C. § 441b, unless financed from voluntary contributions to a separate segregated fund, which may be used by a corporation for "political purposes," § 441b(b)(2)(C).

I note that the rating in question, while not specifically mentioning Federal candidates, offers an analysis of Federal officeholders—many of whom are Federal candidates—based upon votes taken on selected issues. The votes are not merely recorded, however, but are interpreted as "right" or "wrong" (with "right" votes in color for easy distinction), depending on agreement or lack of agreement with the Chamber's position on the issue. The rating's introduction reminds the reader that the selected votes affect the reader personally, refers to a discernable "voting pattern," offers a test enabling the reader to determine how "right" or "wrong" his Congressman has been on the issues, and concludes with the question, "How well are your representatives in Congress representing you?"

The Chamber's rating appears in clear contrast to a rating that does no more than state the vote taken, for throughout the rating it is not the vote, but the voter (Member of the House or Senate), who is prominently before the reader. As one example, the rating is entitled "How They Voted," not "What They Voted On." It could reasonably be read as support or endorsement of those voting in accord with the Chamber, and thus would contain a partisan message. See in this regard informational responses to Opinion Requests # 682 and # 544 (copies enclosed), in which interpreted voting records of a Federal Officeholder, reasonably read to support or oppose the voter, were "in connection with" a Federal election and

thus precluded by 2 U.S.C. § 441b from being financed from general corporate funds.

It is clear that both Congress and the Supreme Court agree a corporation may not make a direct or indirect contribution or expenditure in connection with a Federal election, and such a "connection" would be present in a partisan communication supporting a Federal officeholder who is also a Federal candidate:

> At the present time there is broad agreement as to the essence of the proper balance in regulating corporate and union political activity required by sound policy and the Constitution. It consists of a *strong prohibition on the use of corporate and union treasury funds to reach the general public in support of, or opposition to, Federal candidates* . . . . (Emphasis added.)
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> *Pipefitters* v. *United States*, 92 S.Ct. 2247, 2272 (1972) (quoting Rep. Hansen's summary of § 610 amendment, 117 *Cong. Rec.* 43381)

Under the Act and the Commission's regulations, a corporation, including a corporation like the Chamber, may make partisan communications (other than solicitations) to the general public, so long as the communications are not financed from general corporate funds. 2 U.S.C. § 441b(b)(2)(C) and § 114.5(i) of the regulations. Furthermore, if the communication is limited to members of the Chamber, the communication may be both partisan and financed from the Chamber's corporate treasury. 2 U.S.C. § 441b(b)(2)(A) and § 114.7 and § 114.8(h) of the regulations.

As noted above, § 114.5(i) would allow the distribution of the Chamber's rating to nonmembers if financed by a separate political fund established by the Chamber under the requirements of § 441b. It would also be possible for a person who may make partisan communications to the general public (such as individuals, political com-

mittees, or separate segregated funds of corporations) to purchase the ratings for an amount covering all costs incurred by the Chamber in producing them, and then distribute the ratings to interested parties.

This response is informational only and not an advisory opinion since the Chamber does not have standing to receive an advisory opinion. 2 U.S.C. § 437f. Moreover, this response is based in part on proposed regulations of the Commission which should be regarded as interpretative rules indicating the Commission's view as to the meaning of the pertinent statutory language. The proposed regulations were transmitted to the Congress on August 3, 1976. See 2 U.S.C. § 438(c).

I hope this response is helpful for purposes of your inquiry.

Sincerely yours,

/s/ N. Bradley Litchfield
N. BRADLEY LITCHFIELD
Assistant General Counsel

Enclosures